

[2025] PBRA 8

Application for Reconsideration by Sweeney

Application

1. This is an application by Sweeney (the Applicant) for reconsideration of a decision of a panel of the Parole Board following an oral hearing. This hearing took place over two days, the first day was 3 September 2024 and the second and final day was 13 November 2024. The panel's decision is dated 4 December 2024 and is a decision not to release the Applicant and not to recommend transfer to open conditions. The application has been made on the Applicant's behalf by his legal representatives.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended in 2024) (the Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These include the application; the decision letter of the panel and the dossier of 932 pages. For the avoidance of doubt, I have not had sight of any material that was not disclosed to the Applicant and/or his legal representatives. It was not necessary for me to do so.

Request for Reconsideration

4. The application for reconsideration is dated 13 December 2024.
5. The grounds for seeking a reconsideration are stated to be a) irrationality and/or b) procedural impropriety. Both grounds are different and would need to be argued separately. On reading the application, I have decided that the appropriate ground for reconsideration in this case is procedural impropriety and have approached my decision on that ground alone.
6. The particulars of the ground of procedural impropriety are not stated clearly, however I have been able to infer these from the application. These are:
 - That the panel chair should have recused herself once she had seen material that was subsequently decided by her should not be disclosed to either the Applicant or his legal representatives;



- That the other panel members also had access to this material and by inference they should also have recused themselves;
- That by dint of reading the material not disclosed to the Applicant the panel was not impartial and therefore the Applicant did not have a fair hearing. The Applicant was put at a disadvantage because they did not have access to the material that was not disclosed to him or his legal representatives.

Background

7. The Applicant is serving a life sentence for the offence of murder. He was 20 years old when sentenced and his minimum tariff was 16 years. His tariff expired in September 2016. He has remained in closed conditions throughout his sentence. This is his third review.

Current parole review

8. The Secretary of State (SJS) referred the Applicant to the Parole Board to consider whether or not to direct his release, or failing that, to advise the SJS whether the prisoner should be transferred to open conditions. The referral is dated 13 October 2022. The Applicant was 44 years old at the time of the decision of the Parole Board. I note the length of time between the referral and the review, and the process to the hearing is explained further in the following paragraph.
9. Following the referral, a single member panel carried out a Member Case Assessment (MCA) in April 2023 and directed the case to an oral hearing. A panel of three members was listed to hear the case on 18 December 2023. This panel convened to hear evidence on the Applicant's case, however that panel decided to adjourn the hearing because new information was provided on the day. I will not go into the details of the adjournment as they are not relevant for this reconsideration. However following this adjournment the SJS submitted a non-disclosure application, this meant that a new panel was required.
10. The new panel chair considered the non-disclosure application and granted it. The grant was appealed, and a Judicial Member (appeal member) considered the appeal in June 2024. The appeal member upheld the panel chair's decision to withhold the relevant material from the Applicant as well as the Applicant's representative except for one piece of evidence, which was provided to the Applicant and his legal representative. The panel chair and then the panel members had access to the material not disclosed. This is all provided for under Rule 17 of The Rules and procedurally correct. A gist of the material not to be disclosed was provided in the dossier.
11. The new panel took evidence over two days, as indicated above. The dossier came to 878 pages, this dossier was available to the Applicant and the legal representative. Evidence was taken from a prison psychologist, a psychologist instructed by the Applicant's legal representatives, prison staff, the Prison Offender Manager and the Community Offender Manager.

The Relevant Law



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12. The panel correctly sets out in its decision letter dated 4 December 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

13. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
14. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).
15. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.
16. Rule 17 of the Parole Board Rules provides for the Parole Board's non-disclosure process.

Procedural unfairness

17. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed, or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.
18. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that either:
- (a) express procedures laid down by law were not followed in the making of the relevant decision;
 - (b) they were not given a fair hearing;
 - (c) they were not properly informed of the case against them;
 - (d) they were prevented from putting their case properly;
 - (e) the panel did not properly record the reasons for any findings or conclusion; and/or
 - (f) the panel was not impartial.
19. The overriding objective is to ensure that the Applicant's case was dealt with justly.



The reply on behalf of the Secretary of State/the prisoner

20. The Secretary of State made no submissions in response to the application.

Discussion

21. I take into account that at all times during this review the Applicant has been represented by legal representatives. Any challenge with respect to procedural impropriety that was allegedly evident during the course of the review prior to the decision of the panel could have been made during the hearing itself. I state this because it is relevant in part to my approach in considering the application.
22. The substance of the application is that the Applicant could not have had a fair hearing because the panel had access to material that was withheld from the Applicant and the legal representatives following a procedurally correct process of non-disclosure under Rule 17 of The Rules. The application indicates that the panel should have recused itself after viewing this material.
23. The Applicant did however have material disclosed in a summary (gist) that was deemed both by the panel chair and the appeal to provide sufficient information to the Applicant so as to ensure fairness. The panel chair also decided, and this was agreed to by the appeal member, that a Special Advocate was not required in this particular case to ensure fairness to the Applicant.
24. No further challenge to the appeal member's decision was made by the Applicant or his legal representative at this stage and the matter proceeded to an oral hearing. Any challenge would have been through the administrative courts by way of Judicial Review.
25. At no point during the review can I see any application from the Applicant or his legal representatives that the panel chair or the panel recuse themselves prior to the hearing, although the legal representative knew before the hearing that the panel had access to the non-disclosed material - at the very least from the time of the service of the appeal member's decision in June 2024.
26. The concluding legal submissions, correctly provided after the oral hearing and before the panel made its final decision, make some reference to the non-disclosed material, however this reference is a submission that should the panel make any finding of fact in relation to the Applicant's involvement in an unconvicted matter, *'then the evidence must be produced and tested properly. Not to do this and make a finding of fact would be irrational.'*
27. Taking those submissions into account, the decision letter indicates clearly that the panel made no findings of fact based on the material that was not disclosed. The findings that the panel made are stated in the decision letter and this letter shows that the issues that the panel took into account were fully aired during the hearing. In other words, the Applicant had an opportunity to hear any evidence in relation to any matters on which the panel made any findings and provide his own evidence before any findings were made.



28. In any event, even if the panel had put any weight on the material not disclosed, this would have had to be indicated by way of provision of a 'closed' decision letter, one that was not to be disclosed to either the prisoner or his legal representative. There was no closed letter and I have found that the panel did not take this material into account in its decision.
29. There is nothing in The Rules indicating that any panel that views material that is not to be disclosed to the prisoner and their legal representatives must recuse themselves. Any such rule would make a nonsense out of any non-disclosure process which is expressly provided for so that the panel is able to consider, if appropriate, any material that cannot be disclosed to the prisoner and the legal representative. The only time when it may be appropriate for a panel to consider recusal is if the application for non-disclosure is refused and the SSJ decides to withdraw the relevant material. Even this is not a requirement and it is at the discretion of the panel. In any event that is not the scenario under consideration.
30. I do not find any procedural impropriety in this case. There was no requirement for any panel member to recuse themselves just because they had seen material that was not disclosed to the Applicant or to his legal representatives. This is the point of having a non disclosure process. Also, if there had been any concerns about unfairness in relation to the panel having seen the non disclosed material, it was possible for the legal representative to invite the panel to recuse themselves prior to the hearing. They did not do so, and in any event for the same reason as I give here I cannot see how such an application would have been successful at that time. I also do not consider that the Applicant did not have a fair hearing, based on my considerations as provided for in the preceding paragraphs. Findings were made by the panel using evidence available to the Applicant and this is clearly set out in the decision letter.

Decision

31. Refusal – For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

Chitra Karve
6 January 2025